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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION**

OCULU, LLC,

Plaintiff,

vs.

OCULUS VR, INC.,

Defendant.

Case No.: 8:14-SACV-196-DOC (JPRx)

**[REDACTED] PLAINTIFF OCULU,  
LLC’S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO MOTION *IN  
LIMINE* TO EXCLUDE  
TESTIMONY OF DAVID DREWS  
AND PLAINTIFF’S ALLEGED  
THEORIES OF DAMAGES**

Date: June 8, 2015  
Time: 8:30  
Courtroom: 9D (Santa Ana)  
Judge: Hon. David O. Carter

Trial Date: July 28, 2015

RELATED COUNTERCLAIM

## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. INTRODUCTION**

Defendant Oculus and its legal defense team backed by Facebook are oddly incredulous about this case. Nobody disputes that plaintiff Oculu started using the trademark “Oculu” – and registered that trademark – *before* Oculus made the mistake of selecting its name. It is self-evident that “Oculu” and “Oculus” are confusingly similar words. All of the lawyers working on this case have mistakenly said one of the names and meant the other multiple times in the course of the litigation.

The evidence also proves that “Oculu” and “Oculus” are confusingly similar trademarks, used by two companies in the fast-growing and always-evolving internet and new media marketplace. Think desktop, to laptop, to smartphone, to tablet, to watches, to glasses. An Oculus virtual reality headset is just another platform for viewing content. Oculu is a content provider. They have virtually the same name. That’s a problem the trademark law was intended to solve.

The primary issue on this motion *in limine* is whether plaintiff’s damages expert, David Drews, must be barred from testifying about how much Oculus has been unjustly enriched by its use of the infringing trademarks, and how much Oculu has suffered in lost profits as a result of the infringement.

On unjust enrichment, the parties disagree on the law. Oculus contends that the only disgorgement a Court can order in a trademark case is the defendant’s profits from the sale of *infringing goods or services*. Oculus does not cite any case law that specifically establishes this narrow interpretation of the trademark damages statute, 15 USC § 1117(a). The plain language of 15 USC § 1117(a) does not limit “sales” to goods and services, and it expressly states that the Court must consider “principles of equity.” Oculus should be ordered to disgorge profits from the sale of the infringing trademarks to Facebook. The motion *in limine* should be denied on Mr. Drews’ unjust enrichment testimony.

On Oculu’s lost profits, Oculus does not point to any flaw in Mr. Drews’ methodology, which is summarized on Exhibit 1 to his report. Rather, Oculus’ motion is

1 based on an alleged lack of evidence supporting Mr. Drews' opinion. There is no lack of  
 2 evidence. The lifeblood of Oculus's business is traffic to its website. That traffic was  
 3 growing rapidly until Oculus became a sensation in mid-2012. At that moment, Oculus's  
 4 website traffic suffered a steady decline, along with its revenues. Oculus points to evidence  
 5 that it contends explains the decline in Oculus's website traffic and refutes the drop in  
 6 revenue. Oculus' evidence goes to the weight and credibility, not the admissibility, of Mr.  
 7 Drews' lost profits analysis. The motion *in limine* should be denied on Mr. Drews' lost  
 8 profit testimony.

9 **II. OCULUS' MOTION *IN LIMINE* SHOULD BE DENIED AS TO MR. DREWS'**  
 10 **OPINION ON UNJUST ENRICHMENT.**

11 For purposes of this motion, the Court should assume likelihood of confusion and  
 12 assume Oculus has been infringing Oculus's trademark. The Court should also assume that  
 13 Oculus's business has suffered tremendously since Oculus started using the infringing  
 14 marks, but that such damages are difficult to prove. [REDACTED]

15 [REDACTED]  
 16 [REDACTED] Under these circumstances, according to Oculus, the Court is prohibited, in  
 17 fashioning a remedy, from considering Mr. Drews' testimony on what Facebook paid for  
 18 the infringing Oculus marks. Oculus is wrong.

19 Oculus' argument is based on the false premise that the Court may only disgorge  
 20 profits from the sale of infringing goods or services. Nothing in the applicable statute, 15  
 21 USC § 1117(a), contains such a limitation. The Lanham Act states that a plaintiff is  
 22 entitled to recover the "defendant's profits." 15 USC § 1117(a). "In assessing profits the  
 23 plaintiff shall be required to prove defendant's sales only; defendant must prove all  
 24 elements of cost or deduction claimed." *Id.* Nothing in the statute precludes disgorgement  
 25 of profits on the sale of an asset.

26 Oculus intentionally ignores that, in determining damages and disgorgement of  
 27 profits, the Court must consider "principles of equity." 15 USC § 1117(a). The Lanham  
 28 Act also expressly requires that the Court exercise discretion in awarding profits:

1 “If the court shall find that the amount of the recovery based on  
 2 profits is either inadequate or excessive *the court may in its discretion enter*  
 3 *judgment for such sum as the court shall find to be just*, according to the  
 4 circumstances of the case.”

5 15 USC § 1117(a) (emphasis added). In its Memorandum of Points and Authorities,  
 6 Oculus used ellipses to skip the parts of 15 USC § 1117(a) requiring equitable  
 7 considerations, discretion, and justice in awarding profits. (Memo. at 8:21-28.)

8 In short, the Lanham Act allows disgorgement of profits, and it does not exclude  
 9 profits on the sale of an asset. Moreover, even if “profits” in the Lanham Act did exclude  
 10 profits on the sale of an asset, the Court still has discretion to consider such profits in  
 11 awarding damages.

12 None of the cases Oculus cites directly support its position. The case most on point  
 13 is *Simon Prop. Grp., L.P. v. mySimon, Inc.*, 2001 WL 66408, at \*22-23 (S.D. Ind. Jan. 24,  
 14 2001), which actually supports Mr. Drews’ opinion. In *mySimon*, the jury awarded \$11.5  
 15 million in profits. At trial, the plaintiff’s expert measured damages by estimating the value  
 16 of the infringing marks based on the price another company paid to acquire the defendant.  
 17 The expert estimated that the portion of the acquisition price attributable to the infringing  
 18 marks was \$11.5 million. On post-trial motions, the Court vacated the award, but only  
 19 because the Court awarded injunctive relief and the plaintiff had “conceded that if an  
 20 injunction were to be entered, it would not seek future royalties or its proposed measure of  
 21 mySimon’s profits.” *Id.* at \*23. The Court remarked that “the \$11.5 million figure is more  
 22 similar to a reasonable royalty calculation than to what is traditionally thought of as a  
 23 calculation of ‘defendant’s profits’ in trademark law,” but the Court did not preclude a  
 24 monetary remedy based on any flaw with plaintiff’s damages theory.

25 Oculus claims that [REDACTED] – but Facebook purchased the company  
 26 for \$2 billion. In its Form 10-Q, Facebook concedes that the purchase price includes  
 27 “Tradenames and other,” which Facebook values at \$132 million. Although no witness  
 28 from Oculus has any knowledge about which tradenames are encompassed within the

“Tradenames and other” category, it is beyond a doubt that the infringing tradenames are included.<sup>1</sup> If it is determined that Oculus infringed Oculus’s trademark on the path to such a massive purchase price, and if a portion of the \$2 billion was used to purchase infringing tradenames that Facebook admits have a certain value, Oculus should have the opportunity to present evidence of that value through Mr. Drews for the Court’s consideration in determining damages.

The fact that Oculus chose to distribute all of the profits from the Facebook acquisition to its shareholders – including whatever profits are fairly attributable to the infringing Oculus tradenames – is not a defense. If those profits were illicit, apportion of them may, in the Court’s discretion, be returned to Oculus.

### **III. OCULUS’ MOTION *IN LIMINE* SHOULD BE DENIED AS TO MR. DREWS’ OPINION ON LOST PROFITS.**

Mr. Drews opines that Oculus lost profits “due to Oculus’s emergence as a tech industry phenomenon in the summer of 2012, which led to the crowding out of Oculus from search engine results.” (Peterson Decl., Exh. 7 [“Drews Report”] at 9.) Oculus seeks to exclude this opinion on grounds there is no supporting evidence. Oculus is wrong.

Oculus first argues there is no evidence that Oculus negatively affected Oculus’s website traffic from search engine results. Not so. There *is* evidence that Oculus caused the drop in Oculus’s website traffic. Oculus does not dispute that Oculus’s website traffic was growing rapidly until Oculus became a sensation in mid-2012 and, thereafter, that Oculus’s website traffic suffered a steady decline. (Drews Report at 9.) These undisputed facts – in and of themselves – are evidence that the emergence of Oculus caused the drop in Oculus’s website traffic. [REDACTED]

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<sup>1</sup> No witness to date has claimed any personal knowledge whatsoever about the \$132 million figure, which is why Oculus subpoenaed Facebook to designate a witness on this topic. Facebook filed a motion to quash the subpoena, which is currently pending in the Northern District Court of California. (N.D. Cal., Civil Docket No. 5:15-mc-80064-HRL.)

1 [REDACTED]  
2 Somehow, Oculus takes no responsibility for this reality, which made matters worse for  
3 Oculu when Oculus selected its infringing name and proceeded to become a behemoth.  
4 Third, Oculu's founder John Cecil – a 20 year veteran in the industry – testified to the  
5 negative effect of Oculus on Oculu's search engine results:

6 Q. Please explain.

7 A. Yes. The mark Oculus, then using Oculus, has been – has  
8 negatively affected our search engine optimize – our search engine results on  
9 all words that are important to us.

10 Q. What's your evidence of that, sir?

11 A. A drop-off in traffic from natural listings from Google.

12 Q. You attribute that entirely to my client's use of the name  
13 Oculus VR or Oculus?

14 A. Yes.

15 (King Decl., Exh. 52 [Cecil Depo. Trans., Vol. 1] at 265:8-18].)

16 Oculus ignores all of the foregoing evidence, which supports Mr. Drews' lost profits  
17 opinion. Instead, Oculus focuses only on its evidence. The Court should allow the trier of  
18 fact to consider all of the evidence and give it the weight it deems appropriate.

19 Oculus next argues that Oculu cannot establish any reduction in its revenue  
20 following Oculus' emergence. Oculus is wrong again. Oculus does not dispute Oculu's  
21 basic business model of using search engines to drive traffic to Oculu's website, offering  
22 free trials to consumers, and then converting the free trials into paying customers.  
23 Naturally, as Oculu's website traffic declined, so too did its free trials and paying  
24 customers. Oculus seeks to debunk Oculu's decline in revenues by criticizing Mr. Drews  
25 for relying in his report on estimates and on Mr. Drews' communications with Mr. Cecil.  
26 Oculus also points once again to conflicting evidence. The Court should allow the trier of  
27 fact to consider all of the evidence and give it the weight it deems appropriate.  
28

**IV. OCULUS' MOTION *IN LIMINE* SHOULD BE DENIED AS TO MR. DREWS' TESTIMONY ON THE *SLEEKCRAFT* FACTORS.**

Finally, Oculus seeks to exclude Mr. Drews from providing testimony about the *Sleekcraft* likelihood of confusion factors. This part of Oculus' motion is overbroad and vague and probably could have been avoided if Oculus had not elected to pass on taking Mr. Drews' deposition. As stated in his report, Mr. Drews "assumed" liability for purposes of his damages analysis. He nonetheless should be free to discuss the evidence of trademark infringement in this case to support his opinion that Oculus' unjust enrichment and Oculus's lost profits are attributable to such infringement. The motion *in limine* should be denied on Mr. Drews' testimony about the *Sleekcraft* factors.

**V. CONCLUSION**

For all of the foregoing reasons, Oculus' motion *in limine* should be denied.

Respectfully Submitted,

Dated: April 27, 2015

**THE TAILLIEU LAW FIRM LLP  
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